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UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION

JENI PEARSONS, et al.,  
Plaintiffs,  
v.  
UNITED STATES OF AMERICA, et al.,  
Defendants.

No. 2:23-cv-07952-RGK-MAR

**UNITED STATES OF AMERICA'S  
NOTICE OF MOTION AND MOTION  
TO DISMISS; MEMORANDUM OF  
POINTS AND AUTHORITIES**

Hearing Date: March 4, 2024  
Hearing Time: 9:00 a.m.  
Ctrm: 850

Honorable R. Garv Klausner

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## **NOTICE OF MOTION AND MOTION TO DISMISS**

PLEASE TAKE NOTICE that, on March 4, 2024 at 9:00 a.m., as soon thereafter as they may be heard, Defendant United States of America will, and hereby does, move this Court for an order dismissing all claims asserted against it by the Plaintiffs' First Amended Complaint (FAC) under Fed. R. Civ. P. 12(b)(1) for lack of jurisdiction and 12(b)(6) for failure to state a claim upon which relief may be granted. This motion will be made before the Honorable R. Gary Klausner, United States District Judge, in the Roybal Federal Building and Courthouse located at 255 East Temple Street, Los Angeles, CA 90012.

The United States brings the motion on the following grounds:

1. The United States' sovereign immunity bars claims that arise out of the detention of goods, which may not proceed under the Federal Tort Claims Act;
2. The FAC does not state actionable claims for breach of bailment contract, as it does not allege the existence of a bailment contract, nor could it, because the FBI seized the evidence in a warrant operation, rather than taking it pursuant to an agreement with the Plaintiffs;
3. The FAC fails to state a claim under the Takings Clause because the FBI's seizure of evidence was not a taking of goods for public use;
4. The FAC fails to state an actionable Bane Act claim against the United States, because the United States has not waived sovereign immunity for constitutional claims, and the FAC does not allege the threats, intimidation, or coercion that is required to state such a claim; and
5. The FAC's "As-Applied" cause of action fails to state a claim upon which relief can be granted, and to the extent it is construed to assert a due process violation, the United States has not waived its sovereign immunity with respect to constitutional torts.

This motion is made upon this Notice, the attached Memorandum of Points and Authorities, and all pleadings, records, and other documents on file with the Court in this

1 action, and upon such oral argument as may be presented at the hearing of this motion.

2 This motion is made following the conference of counsel pursuant to Local Rule  
3 7-3 which was held on January 9, 2024.

4

5 Dated: January 16, 2024

Respectfully submitted,

6 E. MARTIN ESTRADA  
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11

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17 The United States of America

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# MEMORANDUM OF POINTS AND AUTHORITIES

## I. INTRODUCTION

The First Amended Complaint (“Complaint” or “FAC”) [Dkt. 44] asserts multiple claims against the United States regarding \$2,000 in cash that was allegedly lost from Plaintiffs’ safe deposit box during the FBI’s criminal investigation of a private vault company. All of the FAC’s claims against the United States, however, fail as a matter of law. The circumstances in which the United States is subject to suit for monetary damages are limited to those clearly delineated by Congress. In that regard, the Federal Tort Claims Act (FTCA) permits *some* types of tort claims to be asserted against the United States, while sovereign immunity continues to bar all other types of tort claims—which the FTCA expressly defines to include all claims arising from the federal government’s allegedly wrongful detention of goods. With respect to situations where personal property is allegedly damaged or lost during the government’s detention of property in a warrant operation, Congress has thus made it clear that the United States shall not be subject to any tort liability. The Court thus lacks subject matter jurisdiction with respect to all of the FAC’s tort claims against the United States.

The FAC also attempts to allege claims under the Little Tucker Act, which permits certain very small breach of contract claims to proceed in District Court. But the FAC does not state facts sufficient to allege a breach of contract claim against the United States, because the FBI's seizure of evidence in a warrant operation against the Plaintiffs' will was not a contract entered into between the United States and the Plaintiffs. A seizure pursuant to a warrant does not create a contract, express or implied.

The FAC also fails to state a claim for a violation of the Takings Clause, because it is well-established that seizures of evidence in criminal investigations are not takings.

The FAC's Bane Act claims are barred by sovereign immunity because they are based on asserted constitutional violations by the United States, and they are also alleged without the requisite supporting facts. Specifically, the FAC fails to plead facts showing that the Plaintiffs were deprived of their civil rights by threats and intimidation; rather it

1 alleges that their property was seized in a warrant operation while they were not present.

2 Finally, the Complaint's last count is a legal argument rather than an affirmative  
 3 claim for relief. Even if this count were construed as a cause of action for money  
 4 damages based on an asserted constitutional violation, however, it is well-established  
 5 that the United States has not waived its sovereign immunity for constitutional torts, and  
 6 there is no jurisdiction for such claims in District Court.

7 Accordingly, the Court should dismiss all of the FAC's claims against the United  
 8 States.<sup>1</sup>

## 9 **II. FACTS ALLEGED BY THE FIRST AMENDED COMPLAINT**

10 According to the FAC, Plaintiffs Jeni Pearson and Michael Storc rented a safe  
 11 deposit box at U.S. Private Vaults (USPV) in Beverly Hills, California. FAC at ¶2. On  
 12 March 22, 2021, operating under a warrant, the FBI "raided" USPV's business premises  
 13 based on suspicion that USPV had committed various crimes. FAC at ¶3. The FBI's  
 14 warrant application stated that by seizing USPV's property, the FBI would end up with  
 15 custody of the individual safe deposit boxes, the contents of which the FBI would  
 16 preserve for safekeeping and eventually return to the rightful owners. FAC at ¶4.

17 Plaintiffs allege that about \$20,000 worth of silver as well as \$2,000 in cash were  
 18 in their safe deposit box. FAC at ¶2. A "Notice of Seizure of Property and Initiation of  
 19 Administrative Forfeiture Proceedings" they received from the FBI, however, only  
 20 reflected the FBI's seizure of the silver and not the asserted cash. FAC at ¶79. The FBI  
 21

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22 <sup>1</sup> In addition to the FAC's claims against the United States, the FAC also asserts  
 23 claims against FBI agents in their individual capacities. The United States currently  
 24 represents Agent Zellhart in her individual capacity and has been substituted as the  
 25 defendant in place of Agent Zellhart by the United States' concurrently filed certification  
 26 pursuant to the Westfall Act. The FTCA encompasses torts and wrongful acts of federal  
 27 employees acting within the scope of official duties. The only proper defendant in a suit  
 28 under the FTCA is the Government. *See* 28 U.S.C. § 2679(b)(1); *Ward v. Gordon*, 999  
 F.2d 1399, 1401 (9th Cir. 1993). In this regard, the Westfall Act provides federal  
 employees absolute immunity from common-law tort claims and other state law claims  
 arising out of acts they undertake in the course of their official duties. *Wilson v. Horton's  
 Towing*, 906 F.3d 776, 780 (9th Cir. 2018); *see also Osborn v. Haley*, 549 U.S. 225, 230  
 (2007). Further, the remaining asserted against Agent Zellhart should be dismissed for  
 the reasons stated in Agent Zellhart's concurrently filed motion to dismiss.

1 returned the silver worth \$20,000 to the Plaintiffs. FAC at ¶82. Plaintiffs filed an  
 2 administrative claim for \$2,000, which was denied with the statement that there was no  
 3 evidence of negligence or wrongful acts on the part of any FBI employee. FAC at ¶85.

4 The FAC asserts claims against the United States under the Federal Tort Claims  
 5 Act (FTCA) and the Little Tucker Act (Counts I, II, III, IV, V). *See* FAC. Count XI of  
 6 the Complaint does not specify which Defendant(s) the purported cause of action is  
 7 asserted against, instead making a legal argument. *See* FAC at ¶220-226.

### 8 **III. ARGUMENT**

#### 9 **A. Sovereign Immunity Bars All Claims Against The United States Arising 10 Out of Detention of Goods (Counts I, II, III, VI, VII, and VIII)**

11 Plaintiffs' FAC asserts Counts I, II, and III against the United States pursuant to  
 12 the FTCA. Pursuant to the Westfall Act, the United States has also been substituted as  
 13 the defendant in place of Agent Zellhart as to Counts VI, VII, and VIII. These claims  
 14 must all be dismissed for lack of subject matter jurisdiction.

15 “It is elementary that the United States, as sovereign, is immune from suit save as  
 16 it consents to be sued, and the terms of its consent to be sued in any court define that  
 17 court’s jurisdiction to entertain the suit. A waiver of sovereign immunity cannot be  
 18 implied but must be unequivocally expressed.” *Tobar v. United States*, 639 F.3d 1191,  
 19 1195 (9th Cir. 2011) (quoting *United States v. Mitchell*, 445 U.S. 535 (1980)). In other  
 20 words, “[a]bsent a waiver, sovereign immunity shields the Federal Government and its  
 21 agencies from suit.” *F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994). Sovereign immunity is  
 22 jurisdictional in nature; “the existence of [the United States’] consent is a prerequisite for  
 23 jurisdiction.” *United States v. Mitchell*, 463 U.S. at 212. “Absent a waiver of sovereign  
 24 immunity, courts have no subject matter jurisdiction over cases against the [federal]  
 25 government.” *Kaiser v. Blue Cross of Cal.*, 347 F.3d 1107, 1117 (9th Cir. 2003) (citing  
 26 *United States v. Mitchell*, 463 U.S. at 212).

27 The federal government may waive its sovereign immunity, but any waiver “must  
 28 be unequivocally expressed in statutory text...and will not be implied.” *Lane v. Pena*,

1 518 U.S. 187, 192 (1996) (citations omitted). The Ninth Circuit applies “traditional tools  
 2 of statutory construction to determine whether the scope of Congress’ waiver is “clearly  
 3 discernable from the statutory text.” *Ordonez v. United States*, 680 F.3d 1135, 1138 (9th  
 4 Cir. 2012) (citations omitted). “If it is, then we abide by Congress’ instruction; if it is  
 5 not, then we “construe any ambiguities in the scope of a waiver in favor of the  
 6 sovereign.” *Id.* (citations omitted). The party asserting a claim against the United States  
 7 bears “the burden of establishing that its action falls within an unequivocally expressed  
 8 waiver of sovereign immunity by Congress.” *Dunn & Black P.S. v. United States*, 492  
 9 F.3d 1084, 1088 (9th Cir. 2007). And unlike actions involving private parties, “where a  
 10 cause of action is authorized against the federal government, the available remedies are  
 11 not those that are ‘appropriate,’ but only those for which sovereign immunity has been  
 12 expressly waived.” *Lane v. Pena*, 518 U.S. at 197 (internal quotation marks omitted); *see also* *Dep’t of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 263-65 (1999).

14 The Federal Tort Claims Act (FTCA) waives the United States’ sovereign  
 15 immunity in a limited number of civil actions for money damages “for injury or loss of  
 16 property, or personal injury or death caused by the negligent or wrongful act or omission  
 17 of any employee of the Government while acting within the scope of his office or  
 18 employment[.]” 28 U.S.C. § 1346(b)(1). However, certain categories of claims are  
 19 expressly exempt from the scope of this waiver of sovereign immunity, including “[a]ny  
 20 claim arising in respect of ... the detention of any goods, merchandise, or other property  
 21 by any officer of customs or excise or any other law enforcement officer.” *Id.* § 2680(c).  
 22 This exception, referred to as the “detention of goods” exception, *see, e.g.*, *Cervantes v.*  
 23 *United States*, 330 F.3d 1186, 1189 (9th Cir. 2003), generally is interpreted broadly,  
 24 consistent with the well-established principle that waivers of sovereign immunity must  
 25 be construed strictly in favor of the sovereign. *See Foster v. United States*, 522 F.3d  
 26 1071, 1074 (9th Cir. 2008); *Lane v. Pena*, 518 U.S. at 192; *United States v. 87 Skyline*  
 27 *Terrace*, 26 F.3d 923, 929 (9th Cir. 1994). Federal courts lack subject matter jurisdiction  
 28 over tort claims falling within such an exception. *Voeltz v. United States*, No. 5:21-CV-

1 00151-FWS-KK, 2023 WL 6881831, at \*4 (C.D. Cal. Aug. 23, 2023).

2 The Complaint's Count I (Conversion and Trespass to Chattels), Count II (Breach  
 3 of Bailment), and Count III (Negligence) are all asserted against the United States under  
 4 the FTCA.<sup>2</sup> All three causes of action arise out of the government's alleged seizure and  
 5 loss of \$2,000 in cash, which Plaintiffs contend were kept in their safe deposit box that  
 6 the FBI seized during a criminal investigation pursuant to a warrant. This seizure falls  
 7 squarely within the detention of goods exception of the FTCA, meaning the United  
 8 States has not waived its sovereign immunity with respect to tort claims arising from  
 9 damage or loss to the property. The Ninth Circuit has held that the detention of goods  
 10 exception "effectively bar[s] any remedy for intentional torts with respect to seizures,"  
 11 [and] notably treat[s] 'seizures' as covered by the detention exception in section  
 12 2680(c)." *DaVinci Aircraft, Inc. v. United States*, 926 F.3d 1117, 1123 (9th Cir. 2019)  
 13 (quoting *Gasho v. United States*, 39 F.3d 1420, 1433 (9th Cir. 1994)).

14 The detention of goods exception to FTCA jurisdiction applies not only to  
 15 intentional conduct by government employees, but also to, as Plaintiffs here allege, "any  
 16 claim 'arising out of' the detention of goods, ... includ[ing] a claim resulting from  
 17 negligent handling or storage of detained property." *Foster*, 522 F.3d at 1074, citing  
 18 *Kosak v. United States*, 465 U.S. 848, 854 (1984). *See also Ali v. Fed. Bureau of*  
 19 *Prisons*, 552 U.S. 214 (2008); *Bramwell v. U.S. Bureau of Prisons*, 348 F.3d 804, 808  
 20 (9th Cir. 2003). Further, there is no difference whether the property was temporarily or  
 21 permanently detained. *DaVinci Aircraft, Inc. v. United States*, 926 F.3d 1117, 1124 (9th  
 22 Cir. 2019). This includes cases in which property is allegedly lost, just as the FAC  
 23 alleges. *See Ali v. Fed. Bureau of Prisons*, 552 U.S. 214 (affirming application of  
 24 exception where BOP officers allegedly lost inmate's personal property).

25 Plaintiffs' tort claims against the United States are thus barred under the detention

26  
 27 <sup>2</sup> With respect to Counts VI, VII, and VIII asserted against the individual  
 28 defendants, the United States has substituted in as the defendant in place of Agent  
 Zellhart. *See supra* fn. 1. Since those counts are essentially identical to Counts I, II, and  
 III, the following discussion applies equally to Counts VI, VII, and VIII.

1 of goods exception to the FTCA's waiver of sovereign immunity, and would remain  
 2 barred even if the Court were to later find that Plaintiffs' assertion of the \$2,000 having  
 3 been in the safe deposit box is true, and find that the FBI failed to meet its obligations in  
 4 some way with respect to the loss of that money. The FBI's alleged failure does not  
 5 overcome the lack of subject matter jurisdiction with respect to FTCA claims. *See, e.g.*,  
 6 *Acevedo v. United States*, No. 122CV00767SKOPC, 2023 WL 2166302, at \*5 (E.D. Cal.  
 7 Feb. 22, 2023) ("Whether BOP policy requires an inmate be given a copy of the  
 8 inventory following property detention, and assuming Plaintiff's assertion that he  
 9 received no such inventory is true, that alleged failure does not act to overcome this  
 10 Court's lack of subject matter jurisdiction over Plaintiff's claim."). *See also Agro*  
 11 *Dynamics, LLC v. United States*, No. 20-CV-2082-JAH-KSC, 2023 WL 6130813, at  
 12 \*13–14 (S.D. Cal. Sept. 19, 2023) (dismissing FTCA causes of action while a claim  
 13 regarding the constitutionality of the search and seizure remains).

14 Indeed, Congress has very carefully delineated the only specific contexts in which  
 15 monetary claims can proceed based on the government's seizure of goods—which do not  
 16 include Plaintiffs' claims here, arising from the seizure of evidence. In the Civil Asset  
 17 Forfeiture Reform Act of 2000 ("CAFRA"), Pub.L. No. 106–185, § 3, 114 Stat. 202,  
 18 Congress added paragraphs (1)–(4) to 28 U.S.C. § 2680(c), which provide that the  
 19 waiver of sovereign immunity in 28 U.S.C. § 1346(b) extends to damage to property  
 20 while in the possession of certain government employees, including law enforcement  
 21 officers, if-and-only-if:

- 22 (1) the property was seized for the purpose of forfeiture under any provision of  
 23 Federal law providing for the forfeiture of property other than as a sentence imposed  
 24 upon conviction of a criminal offense;
- 25 (2) the interest of the claimant was not forfeited;
- 26 (3) the interest of the claimant was not remitted or mitigated (if the property was  
 27 subject to forfeiture); and
- 28 (4) the claimant was not convicted of a crime for which the interest of the claimant

1 in the property was subject to forfeiture under a Federal criminal forfeiture law.

2 28 U.S.C. § 2680(c).

3 This limited type of claim does not apply here. First, assuming for purposes of this  
 4 motion that the \$2,000 cash was in the box when it was seized, it was not seized “for the  
 5 purpose of forfeiture.” Ninth Circuit law is clear that the CAFRA amendment to 2680(c)  
 6 only applies to seizures where their *only* purpose was forfeiture. *Foster v. United States*,  
 7 522 F.3d at 1075. No facts alleged in the FAC plausibly establish that the FBI’s seizure  
 8 of the USPV vaults was only for the purpose of forfeiture. Indeed, Plaintiffs concede that  
 9 the other property in their box was returned to them (the \$20,000 in silver). *See* FAC at  
 10 ¶4. Moreover, Plaintiffs affirm that a purpose of the seizure was to shut down the USPV  
 11 business entirely, the company having been indicted for money laundering and drug  
 12 trafficking. *See* FAC at ¶ 33 (USPV indictment on March 9, 2021); ¶ 47 (alleging that  
 13 the government wanted to seize the nest of boxes “to bring USPV’s business to a  
 14 “screeching halt”); ¶ 117 (alleging that the seizure was intended to “shut down USPV’s  
 15 business”); ¶¶ 139, 149-151, and 170 (same). Thus, the CAFRA amendment to 2680(c)  
 16 does not apply.

17 In *Foster*, the Ninth Circuit reasoned that “law enforcement officers who seize  
 18 property for law enforcement purposes often are operating in hostile or dangerous  
 19 environments, whether or not they anticipate that, eventually, a forfeiture may result  
 20 from their efforts.” *Foster*, 522 F.3d at 1078. Here, the FAC alleges that the FBI seized  
 21 “hundreds” of USPV safe deposit boxes pursuant to the seizure warrant, FAC at ¶ 150,  
 22 and that the inventory searches of those boxes “demanded significant time and effort[.]”  
 23 FAC at ¶ 4. Congress had good reason for its decision not to waive the United States’  
 24 sovereign immunity for tort claims arising from this context: such liability “could  
 25 hamper law enforcement officers’ effectiveness in carrying out the important purposes  
 26 underlying the seizure and redirect their attention from the possibility of danger in  
 27 executing the search warrant to the possibility of civil damages.” *Foster*, 522 F.3d at  
 28 1078. *See also, generally, Agro Dynamics*, 2023 WL 6130813. What’s more, if Congress

1 had waived the United States' sovereign immunity in such circumstances, "the scarcity  
 2 of resources to inspect and protect the property means that law enforcement officers  
 3 might be subject to false and fraudulent claims." *Id.* at 1078-79.

4 Accordingly, Plaintiffs' claims against the United States in Counts I, II, II, VI,  
 5 VII, and VIII are barred by sovereign immunity. Accordingly, these claims must be  
 6 dismissed for lack of subject matter jurisdiction.

7 **B. The FAC Fails to State a Claim for Breach of Bailment Contract**  
 8 **(Counts II, IV, and VII)**

9 The Tucker Act, 28 U.S.C. § 1491(a)(1)—and the Little Tucker Act (28 U.S.C. §  
 10 1346(a)(2) for matters involving less than \$10,000—waives sovereign immunity for  
 11 claims predicated on the Constitution, a federal statute or regulation, or a contract with  
 12 the Government. *See Loc. Initiative Health Auth. for L.A. Cnty. v. United States*, No. 17-  
 13 1542C, 2019 WL 625446 (Fed. Cl. Feb. 14, 2019). "Still, the Tucker Act does not create  
 14 a separate right to money damages. A plaintiff suing the Government for money  
 15 damages must therefore base its claims upon a separate source of law that creates such a  
 16 right." *Id.*, citing *United States v. Testan*, 424 U.S. 392, 398 (1976). Here, Plaintiffs have  
 17 alleged a breach of bailment cause of action under both the FTCA—which, as discussed  
 18 above, contains an exception for detention of goods—and under the Little Tucker Act  
 19 (28 U.S.C. § 1346(a)(2)). The FAC however fails to state facts sufficient for such a claim  
 20 under the Little Tucker Act because there was no bailment.

21 A bailor/bailee relationship arises when a "voluntary deposit is made by one  
 22 giving to another, with his consent, the possession of personal property to keep for the  
 23 benefit of the former, or of a third party." *Dimerco Express (U.S.A.) Corp. v. Max*  
 24 *Oshima, Inc.*, No. CV072043GAFPLAX, 2007 WL 9706128, at \*3 (C.D. Cal. July 18,  
 25 2007) (quoting Cal. Civ. Code § 1814). Here, there was no such relationship between  
 26 Plaintiffs and the United States. There is no allegation that Plaintiffs voluntarily  
 27 entrusted the \$2,000 to the United States. Exactly to the contrary, Plaintiffs allege that  
 28 this property was unlawfully seized pursuant to an invalid warrant operation. Against

1 that background, Plaintiffs attempt to assert a bailment claim by merely stating that the  
2 contents of the safe deposit boxes were delivered to the custody of the government. *See*  
3 FAC at ¶137. But the FAC repeatedly states that the money was involuntarily seized,  
4 directly contradicting the existence of the mutual intent that would be required for an  
5 implied-in-fact or express contract. Put another way, Plaintiffs did not voluntarily deliver  
6 the contents of their box to the FBI, and the United States did not even arguably form a  
7 contract with the Plaintiffs by seizing those contents pursuant to warrant.

8 “A seizure, essentially by definition, lacks mutual intent. Thus, as the government  
9 correctly points out, a seizure pursuant to the government’s authority...generally will not  
10 give rise to an implied-in-fact bailment contract.” *Kam-Almaz v. United States*, 682 F.3d  
11 1364, 1369 (Fed. Cir. 2012). A seizure does “not suggest any mutual intent to enter a  
12 bailment arrangement, *i.e.*, they do not suggest the presence of the prerequisites of an  
13 implied-in-fact bailment contract—an offer, an acceptance, and the passage of  
14 consideration between the parties.” *Marshall v. United States*, No. 514-88C, 1990 WL  
15 145424 (Cl. Ct. Oct. 4, 1990); *see also Llamera v. United States*, 15 Cl.Ct. 593, 599  
16 (1988) (refusing to view the unilateral act of federal officials seizing plaintiff’s personal  
17 property as evidence of any intent to enter into a bailment agreement and, in addition,  
18 there was also no basis for finding consideration); *Husband v. United States*, No. 09-  
19 74C, 2009 WL 3754169 (Fed. Cl. Oct. 30, 2009) (no implied bailment contract even  
20 where the complaint alleges that the government gave plaintiff a receipt for the seized  
21 property); *Bakay v. Yarnes*, 431 F. Supp. 2d 1103, 1112 (W.D. Wash. 2006) (dismissing  
22 a bailment claim as a matter of law because seizure of cats pursuant to a warrant did not  
23 create an implied contract/bailment contract). Without facts plausibly alleging the  
24 existence of a bailment (and with the FAC’s alleged facts directly contradicting and  
25 refuting its existence), there can be no claim for breach of bailment. Counts II, IV, and  
26 VII should thus be dismissed.

27

28

1                   **C. The FAC Fails to State an Actionable Claim under the Takings Clause**  
 2                   **(Count V)**

3                   The FAC also fails to state an actionable claim under the Takings Clause of the  
 4 Fifth Amendment. The Fifth Amendment to the Constitution states that “private property  
 5 shall not be taken for public use, without just compensation.” U.S. CONST. amend. V.  
 6 In order for there to be a remedy under this cause of action, there has to have been an  
 7 actual “taking” in this context; the clause only “requires compensation in the event of  
 8 otherwise proper interference amounting to a taking.” *Lingle v. Chevron U.S.A., Inc.*,  
 9 544 U.S. 528, 543 (2005). The “public use” requirement of the Takings Clause “goes to  
 10 the legitimacy of the government’s taking to begin with; if a taking is not for public use,  
 11 the government has no right to complete the act of eminent domain.” *Lee v. City of*  
 12 *Chicago*, 330 F.3d 456, 475 (7th Cir.2003) (Wood, J., concurring). In other words, a  
 13 “taking” that is not “for public use” is not a taking at all.

14                  Here, even assuming that the government had retained the \$2,000 at issue, that  
 15 retention does not constitute such a taking under the Fifth Amendment. Plaintiffs’  
 16 “Takings Clause claim fails because the Takings Clause …does not apply to seizures in  
 17 the law enforcement context.” *Agro Dynamics*, 2023 WL 6130813 at \*8. This is because  
 18 “public use” does not include any government use of private property aimed at  
 19 promoting the common good, including enforcement of the criminal laws. *AmeriSource*  
 20 *Corp. v. United States*, 525 F.3d 1149, 1153 (Fed. Cir. 2008). Thus, items seized by the  
 21 government under its police power are not seized for “public use” within the meaning of  
 22 the Fifth Amendment, and therefore do not constitute a taking. *Arbelaez v. United States*,  
 23 No. 09-505C, 2010 WL 3705260 (Fed. Cl. Sept. 23, 2010). *See also Hand v. Jones*, No.  
 24 EDCV200879FLAJEM, 2021 WL 4690589, at \*9 (C.D. Cal. Feb. 12, 2021), report and  
 25 recommendation adopted, No. 520CV0879FLAJEMX, 2021 WL 4702435 (C.D. Cal.  
 26 Feb. 25, 2021) (dismissing Takings claim where the plaintiffs’ birds were euthanized  
 27 pursuant to a warrant).

1                   **D. The FAC Fails to State Actionable Claims under the Bane Act (Counts**  
 2                   **IX and X)**

3                   Counts IX and X both assert Bane Act claims against the FBI agents in their  
 4 individual capacities. However, since the individuals—including Special Agent  
 5 Zellhart—were executing a warrant within their scope of employment, the FTCA  
 6 provides the *exclusive* remedy for their alleged wrongdoing—a suit against the United  
 7 States. The United States has filed a certification under the Westfall Act, substituting  
 8 itself as the defendant in place of Agent Zellhart. A plaintiff “ordinarily cannot bring  
 9 state-law tort actions against employees of the Federal Government.” *Minneci v. Pollard*,  
 10 565 U.S. 118, 126 (2012) (explaining that the Westfall Act, which amended the FTCA,  
 11 “substitut[es] United States as defendant in tort action against federal employee[s]”).  
 12 Where, as here, Plaintiffs allege “personal injury or death arising or resulting from the  
 13 negligent or wrongful act or omission of any employee of the Government while acting  
 14 within the scope of his office or employment,” the FTCA provides that a suit against the  
 15 United States shall be “exclusive of any other civil action or proceeding for money  
 16 damages by reason of the same subject matter against the employee whose act or  
 17 omission gave rise to the claim[.]” 28 U.S.C. § 2679(b)(1).

18                   As the United States has been substituted as the defendant for the Bane Act claims  
 19 pursuant to the Westfall Act, those claims necessarily fail as against the United States  
 20 because they are either (a) barred by the FTCA’s jurisdictional limitations discussed  
 21 above (*i.e.*, they arise from the detention of goods); or else (b) they are premised on  
 22 alleged constitutional violations, which may not be asserted against the United States as  
 23 the basis for tort liability. In *Blanchard v. County of Los Angeles*, 2022 WL 17081308, at  
 24 \*3 (C.D. Cal. Aug. 25, 2022), the court dismissed a Bane Act claim premised on Cal.  
 25 Constitution, Article I, Section 13, noting that it is “substantially equivalent to the Fourth  
 26 Amendment” and that “allowing [plaintiff] to bring a Bane Act claim based on the  
 27 ‘substantially equivalent’ provision of the California constitution would in effect permit  
 28 her to sue the federal government for a Fourth Amendment violation, which is precisely

what is prohibited.” (Citing *Delta Savings Bank v. United States*, 265 F.3d 1017, 1026 (9th Cir. 2001)). Similarly, here, Plaintiffs may not overcome the barriers to their *Bivens* claim by simply relabeling their claim for the same wrongs under the Bane Act. *See Agro Dynamics*, 2023 WL 6130813 at \*12; *Est. of Mejia v. United States*, No. 20-CV-2454-L-KSC, 2023 WL 2994114, at \*2 (S.D. Cal. Apr. 18, 2023); *Est. of Escobar v. United States*, No. 20-CV-2454-L-KSC, 2022 WL 19037165, at \*3 (S.D. Cal. Dec. 2, 2022).

In addition, Plaintiffs’ FAC fails to alleged facts sufficient to state Bane Act claims. To state a claim under the Bane Act, a plaintiff must establish that the defendant either “tried to or did prevent the plaintiff from doing something he or she had the right to do under the law or to force the plaintiff to do something that he or she was not required to do under the law” through the use of “threats, intimidation or coercion.” *Price v. Peerson*, 2014 WL 12579814, at \*3 (C.D. Cal. Feb. 12, 2014) (Hon. Philip S. Gutierrez) (quoting *Austin B. v. Escondido Union Sch. Dist.*, 149 Cal. App. 4th 860, 833 (2007)). The key element in Bane Act cases is “the element of threat, intimidation, or coercion.” *Han v. Cty. of Los Angeles*, 2016 WL 2758241, at \*9 (C.D. Cal. May 12, 2016) (Hon. Dean D. Pregerson) (quoting *Shoyoye v. Cnty. of Los Angeles*, 203 Cal. App. 4th 947, 959 (2012)). *Han* found that stating a claim “requires a showing of coercion independent from the coercion inherent in the wrongful detention [or other tort] itself.” *Id.* (alterations in original). Here there are no allegations of threats, intimidation, or coercion—indeed, there are no allegations that Special Agent Zellhart or anyone else in the FBI even knew about the Plaintiffs, much less threatened them. Plaintiffs’ Bane Act claims must be dismissed accordingly.

#### **E. The FAC Fails to State an Actionable Claim Under the Fifth Amendment Due Process Clause (Count XI)**

The last claim, “Count XI: As-Applied Deprivation of Property Without Due Process of Law Under the Fifth Amendment Due Process Clause,” does not ask for any monetary or declaratory relief, but rather is simply an argument challenging whichever

1 law might prevent Plaintiffs from recovering on their claims. This count should be  
 2 dismissed for failure to state upon which relief can be granted, as it does not constitute a  
 3 cause of action at all. Instead, it just argues that the Court's application of the law<sup>3</sup> would  
 4 constitute a due process violation.

5 Even if the Court were to construe Count XI as asserting a cause of action for a  
 6 Fifth Amendment violation, the Complaint does not assert any statutory basis for  
 7 subjecting the United States to suit for monetary remedies under this theory. As  
 8 discussed previously, there must be an explicit waiver of sovereign immunity in order to  
 9 bring a claim for monetary remedies against the United States. It is well-established that  
 10 the United States has not waived its sovereign immunity with respect to constitutional  
 11 tort claims. *See Pesnell v. United States*, 64 F. App'x 73, 74–75 (9th Cir. 2003). *See*  
 12 *also, e.g., Benoit v. U.S. Dep't of Agric.*, 577 F.Supp.2d 12, 26 (D.D.C.2008) (stating  
 13 that the United States “has not waived its sovereign immunity to damages claims of  
 14 violations under the Constitution” including plaintiffs’ claims for due process of law  
 15 under the Fifth and Fourteenth Amendments to the United States Constitution), aff'd,  
 16 608 F.3d 17, 20–21 (D.C. Cir. 2010). Thus, individuals do not have a “cause of action  
 17 directly under the United States Constitution” for violation of their constitutional rights.  
 18 *Azul-Pacifico, Inc. v. City of Los Angeles*, 973 F.2d 704, 705 (9th Cir. 1992). *See also*  
 19 *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1854 (2017).

20 In *F.D.I.C. v. Meyer*, the plaintiff sued the United States claiming that his  
 21 summary discharge from a federal institution “deprived him of a property right without  
 22 due process of law in violation of the Fifth Amendment.” *F.D.I.C. v. Meyer*, 510 U.S. at  
 23 471. The U.S. Supreme Court found that such a claim is barred as against the United  
 24

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25 <sup>3</sup> The Complaint alleges that this Count is brought “[t]o the extent the previous  
 26 counts brought against Defendants in this Complaint are subject to legal defenses (under  
 27 the FTCA [for the United States]),” stating that “those statutes are unconstitutional as  
 28 applied” for purportedly violating Plaintiffs’ right to due process. FAC at ¶¶225-226.  
 Not only is this not a cause of action, it is sovereign immunity, not the FTCA, that bar  
 Plaintiffs’ claims. The FTCA operates to allow certain claims that would otherwise be  
 barred, but Plaintiffs’ claims do not fall under the FTCA’s waiver of sovereign  
 immunity.

1 States, as it is not “cognizable” under 28 U.S.C. § 1346(b). *Id.* To be actionable under §  
2 1346(b), a claim must allege, *inter alia*, that the United States “would be liable to the  
3 claimant” as “a private person” “in accordance with the law of the place where the act or  
4 omission occurred.” A constitutional tort claim, the Court in *F.D.I.C. v. Meyer* found,  
5 could not contain such an allegation. *Id.* at 477-78. *See also Stevens v. Department of*  
6 *Treasury*, 500 U.S. 1 (1991) (violations of Title VII and the constitution are not  
7 cognizable under the FTCA). The *Meyer* Court refused to create such a new remedy  
8 against federal agencies. “Such a remedy would create a potentially enormous financial  
9 burden for the Federal Government, a matter affecting fiscal policy that is better left to  
10 Congress.” *F.D.I.C. v. Meyer*, 510 U.S. at 472. Here, Count XI argues a violation of the  
11 Fifth Amendment due process clause, as in *Meyer*. The United States has not waived its  
12 sovereign immunity with respect to such a claim, and it should be dismissed.

## 13 | IV. CONCLUSION

14 For the foregoing reasons, the United States respectfully requests that the Court  
15 dismiss all the FAC's claims against the United States, including those claims for which  
16 the United States has been substituted in as the defendant pursuant to the Westfall Act.

## **CERTIFICATE OF COMPLIANCE**

The undersigned, counsel of record for Defendant, certifies that this brief contains 5,108 words, which complies with the word limit of L.R. 11-6.1 and the Court's word limit.

Dated: January 16, 2024

/s/ *Yujin Chun*  
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